April 9, 2009

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
400 Yesler Way, Room 404
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-1654
Email hearingexaminer@kingcounty.gov

REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E07G0234**

DAVE AND TERRI BOWDEN
Code Enforcement Appeal

Location: 17823 Southeast 224th Street

Appellants: Dave and Terri Bowden
represented by **Steve Hammond**
CAPR
718 Griffin Avenue, #7
Enumclaw, Washington 98022

King County: Department of Development and Environmental Services (DDES)
represented by **Holly Sawin**
900 Oakesdale Avenue Southwest
Renton, Washington 98055
Telephone: (206) 296-6772
Facsimile: (206) 296-6604

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation: Deny appeal with revised compliance schedule
Department's Final Recommendation: Deny appeal with revised compliance schedule
Examiner's Decision: Grant appeal in part; deny in part with further revised compliance schedule

EXAMINER PROCEEDINGS:

Hearing opened: December 4, 2008
Hearing closed: December 4, 2008

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. This Report and Decision encompasses the disposition of appeals by Dave and Terri Bowden of two respective Code Enforcement Notices and Orders issued by the King County Department of Development and Environmental Services (DDES). DDES issued the Notices and Orders to the Bowdens for activities conducted on their subject property at 17823 Southeast 224th Street. The two appeals were consolidated for concurrent consideration.

2. On June 17, 2008, DDES issued the first Code Enforcement Notice and Order to the Bowdens that found code violations on their RA-5 zoned property in the unincorporated Lake Youngs/Shadow Lake area, east of Kent and north of Covington. The June 17, 2008 Notice and Order violations were subsumed into a subsequent Supplemental Notice and Order issued September 12, 2008.[1] The Supplemental Notice and Order cited the Bowdens and the property with the following violations of county code:

   A. i. Clearing in excess of rural area clearing limits.
      ii. Clearing/grading within off-site wetland and/or wetland buffer.
      iii. Grading (placement of gravel) creating approximately 35,800 square feet of new impervious surface exceeding the maximum impervious percentage limits (20% of parcel),

      all of the above actions having been conducted without required permits.

   B. i. Remodeling of [addition to] a 1,015 square foot agricultural barn (constructed under building permit B9107786) into a four-bay, approximately 3,100 square foot structure without required building permits.
      ii. Use of such structure as a non-agricultural use (garage/office) on a parcel without an established primary use (residential or agriculture) in a zone that does not permit such use.

   The Notice and Order required correction of the found violations by application and obtainment of a grading permit, and obtainment of a building permit for the remodeling/expansion of the barn structure. DDES notes that a critical area designation will be required for the building permit review.

3. The Bowdens' appeal makes the following claims:

   A. Clearing and wetland impacts were caused by a previous owner and were subject to prior enforcement actions which had been officially closed.

   B. The impervious surface creation violation is stipulated as possibly accurate, but including the existing driveway "easement" (actually a panhandle) land area in the overall impervious surface area calculation is subject to dispute.

[1]Unless the context indicates otherwise, all reference hereinafter to "Notice and Order" is a reference to the consolidated two Notices and Orders. Unless a specific reference is made to an individual Notice and Order, the reference is to both in their cumulative effect.

C. The assertion of a garage/office (non-ag) use of the agricultural barn structure is disputed as unsubstantiated and untrue.

D. In response to the sequence of enforcement orders, the Bowdens complain about being presented with "shifting goalposts" of compliance requirements. The Bowdens also complain that DDES has given them no credit for their having planted 500 trees on the property. The Bowdens reiterate that the driveway portion of the property is not newly created impervious surface, but was only resurfaced in repair and maintenance. The Bowdens further assert that the impervious surface violation charge is unsupported by actual measurement or substantiated facts. They also reiterate that the charged non-agricultural use of the barn structure is without merit. Lastly, the Bowdens stipulate that the charge of remodeling/addition of the agricultural barn without permits "may have some merit." (The additions were fully stipulated to at hearing.)

4. The general rural area clearing limits imposed in the county grading code (Chapter 16.82 KCC), particularly KCC 16.82.150 in this case, have been invalidated by the Court of Appeals. On March 3, 2009, the Washington Supreme Court declined to review the Court of Appeals ruling. [*Citizens' Alliance for Property Rights v. Sims*, Court of Appeals No. 59416-8-I]

5. The next clearing/grading violation found in the Notice and Order is a charge of "clearing/grading within off-site wetland and/or wetland buffer." The evidence shows, despite the Notice and Order's vagueness about the charge, that the area onsite in question is allegedly wetland buffer; any pertinent actual wetland is offsite of the property. Clearing may or may not have been conducted within a regulated wetland buffer on the property, but the evidence presented into the record is insufficiently persuasive of the charge in the Notice and Order.

A. DDES offers a photograph of a purported wetland area offsite, with no persuasive foundational demonstration of its specific location and boundaries ("wetland edge"; see KCC 21A.06.1395) relative to the property (and therefore relative to the clearing/grading area). It is therefore unclear from the record as to what area *onsite* actually constitutes the regulated wetland buffer area charged to have been violated.

B. In addition, DDES submits photography and testimony of the presence of "standing water" and very general statements about certain vegetation species present in the alleged wetland area, but the evidence presented is insufficient for a finding of wetland presence in the vague area cited by DDES.

i. Mere presence of standing water is insufficient qualification of a regulated wetland. The zoning code definition of "wetland" states that a wetland "is inundated or saturated by ground or surface water at a *frequency and duration* sufficient to *support, and under normal circumstances supports, a prevalence of vegetation typically adapted for life in saturated conditions.*" (KCC 21A.06.1391, emphasis added) The presence of standing water does not in and of itself demonstrate inundation or saturation by ground or surface water at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. The frequency and duration of inundation or saturation have not been demonstrated by the evidence presented.

ii. Nor is there any showing that the asserted standing water supports "a prevalence of vegetation typically adapted for life in saturated soil conditions." DDES offered no facts about the wetland-qualifying characteristics of the cited vegetation, *i.e.*, no specific reference to its facultative or indicator species status.

C. It has simply not been demonstrated by persuasive evidence that the area alleged by DDES to be a wetland is in fact a wetland under the applicable regulatory definition, and therefore the charge of violation of wetland buffer by clearing is unsubstantiated.

6. The Appellants assert that the clearing conducted on the property was conducted by a prior owner, and in effect claim "innocent purchaser" status regarding such violation. DDES questioned the Appellants' contention, in part relying on a 2002 aerial photograph which it contends shows, compared to a 2005 photo, that the property was vegetated not too long prior to the Appellants' April 3, 2003 purchase of the property. But DDES acknowledged that because of the 2002 date of the earlier photo it was unable to conclude that the clearing had been performed by the Appellants. The preponderance of the evidence in the record is not persuasive that the subject clearing activity was conducted during the time of ownership of the property by the Appellants. In any case, the issue is moot given the invalidation of the clearing limits at issue, and the above ruling that the wetland buffer clearing violation has not been proven. (As the current property owners, the Appellants would still have been responsible for any necessary corrections, as violations are essentially inherited by successor owners; they would not however be subject to fines and penalties for actually perpetrating the violation. [KCC 23.02.130.B and 23.36.030.B])

7. The next finding of violation in the Notice and Order is the creation of approximately 35,800 square feet of new impervious surface (which significantly exceeds the 20 percent maximum impervious surface limit for the RA-5 zone set forth in KCC 21A.12.030).[2] That charge is supported by a preponderance of the evidence. The impervious surface area onsite is not actually all new, as the record bears out, since the existing driveway, which had been surfaced imperviously in the past, is included in the calculation.[3] [4] Nor is it all by placement of gravel; some is by compaction. But the charge of violation is essentially correct, since the regulation operates cumulatively, *i.e.*, the 20 percent limit is the cumulative maximum. The Examiner concurs with and accords deference to DDES's code interpretation of the cumulative nature of the limit. [*Mall, Inc. v. Seattle*, 108 Wn.2d 369, 739 P.2d 668 (1987)] The Appellant's implied assertion that the historic driveway area should not be counted in the calculation is contrary to the regulation and therefore unpersuasive of error in the Notice and Order. The respective violation found in the Notice and Order is sustained.

8. A grading permit is required for the creation of impervious surface on the property, because of the area affected exceeding 2,000 square feet of area. [KCC 16.82.051.B and C.2] The order below shall establish a compliance schedule for obtainment and implementation of a grading permit.

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[2]The appeals did not contest the Notice and Order finding that the area subject to the grading and encompassed by the DDES grading/impervious surface calculations constitutes impervious surface as defined in the code. The record is persuasive that the area graded on the property now constitutes impervious surface, by compaction and in some areas surfacing with crushed rock.

[3] DDES acknowledged at hearing that the extensive driveway work was not "clear enough" to be determined to be "new" grading.

[4]Without the driveway area counting, the land area of new impervious surface would be very close to the 20 percent limitation, but including it, as is proper, the land area significantly exceeds the limit.

9. In its department report on the instant appeal, DDES has also noted additional allegations of violation of the 7,000 square foot clearing and 100 cubic yard grading permit thresholds, contending that those thresholds were exceeded in activity on the property. Those allegations were not expressly charged in the either of the Notices and Orders at issue in this appeal case and are disregarded in this proceeding.

10. The Appellant has stipulated to the need for a building permit for the additions made to the originally permitted barn (in part terming the work "closing in the structure"), which greatly expanded the floor area of the structure.[5] The respective charge of violation shall therefore be sustained and compliance required as set forth in the order below, allowing time for submittal of a permit application.

11. Regarding the land use of the agricultural barn structure, DDES contends that the barn is not permitted in and of itself without a "primary" agricultural or residential activity being conducted on the site. The charge is not supported by a preponderance of the evidence in the record, which is skimpy at best. The only persuasive evidence is the Appellant's sworn testimony that the building is used for storage of a tractor, and is not used as a "garage/ office" as charged. The Appellant has also testified that a significant number of trees were planted on the property. The aggregation of such facts of the land use onsite, which are unrefuted, leads to a finding that one apparent land use of the property is a silvicultural (tree growing) use, classified in the zoning code as the "growing & harvesting forest production" use, permitted outright in the RA-5 zone. The Appellant testified that he also uses the structure to store hay and hayhauling machinery and trucking. That use would seem to be agricultural in nature, also permitted outright in the RA-5 zone. In the final analysis, the evidence presented in the record is not persuasive of a zoning violation by the use of the building and property; more to the point with respect to the specific stated charge of the Notice and Order, the charge that the structure is used as a non-agricultural garage/office without an established primary use is not sustained by the presented record.

CONCLUSIONS:

1. As noted previously, the rural area clearing limits set forth in KCC 16.82.150 have been invalidated by the Court of Appeals, which invalidation the Washington Supreme Court recently declined to review. [*Citizens' Alliance for Property Rights v. Sims*, Court of Appeals No. 59416-8-I] As the Notice and Order's charge of clearing limit violation was based on a regulation which has been judicially invalidated, it is unsupported by the law and shall be reversed.[6]

2. The Notice and Order finding of violation regarding "clearing/grading within off-site wetland and/or wetland buffer" is not supported by the evidence presented and shall be reversed.

3. The clearing/grading which created impervious surface in excess of maximum percentage limits imposed by KCC 21A.12.030 is sustained by a preponderance of the evidence and shall be affirmed. Review and correction are necessary, and a grading permit is required for the subject

[5] The Appellants expressed concern regarding review and permit fees that attach to permit requirements. Those concerns are not under the Examiner's jurisdiction, but under DDES's administrative authority, and should be taken up with DDES.

[6] It should be noted that the invalidation is not merely prospective, it is retroactive; the effect of the ruling is that the law was invalid from its first effectiveness. Although at the time the clearing occurred the clearing was apparently in violation of the law, any such violation is rendered null and void by the subsequent invalidation.

impervious surface creation. It shall be required in the revised compliance schedule below. (The compliance schedule shall be adjusted to reflect the time taken up by the appeal process.)[7]

4. The finding of violation in the Notice and Order regarding the land use of the agricultural barn structure is not sustained by the evidence in the record and shall be reversed.

5. The Appellant has stipulated to the requirement of a building permit for the agricultural barn additions. The pertinent finding of violation in the Notice and Order is accordingly sustained. The building permit shall be required to be obtained; alternatively, the unpermitted portions of the structure may be demolished and removed in compliance with applicable regulations.

6. While the Examiner is appreciative of a concern about "moving goalposts" (and would find goalpost shifting arising from other than receipt of new information or correction of unfortunate error to be troubling), the issue is generally a matter under DDES's administrative authority and responsibility, not the Examiner's in the context of this appeal consideration. Relief must be sought through the executive chain of command and/or perhaps litigation.[8]

DECISION:

The charge of code violation by clearing in excess of the rural clearing limits set forth in the now-invalidated KCC 16.82.150 is reversed as unfounded by the law. The found violation of clearing/grading within a wetland and/or wetland buffer is unsupported by a preponderance of the evidence and is also reversed. The charge of violation of land use regulations by operation of a garage/office is likewise unsupported by a preponderance of the evidence and is reversed. The appeal is granted in such regard.

With respect to the remaining violations, the appeal is denied and the findings of violation with respect to a) creation of impervious surface in excess of maximum impervious surface limits established by KCC 21A.12.030, and b) construction of additions to the subject structure without obtaining required building permits, inspections and approvals, are sustained, provided that the compliance schedule is revised as stated in the following order.

ORDER:

1. Submit a complete grading permit application *by no later than* **May 28, 2009**. Thereafter, all pertinent timeframes and stated deadlines for additional information, response, supplementary submittals, etc., if any shall be diligently observed by the Appellants through to permit issuance and final inspection.

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[7] There was discussion at hearing regarding the standards of remediation appropriate to apply to the excess impervious surface: depths of topsoil, nature of existing soils in the area, etc. [See, e.g., KCC 16.82.100.8.g.1 cited by DDES] Those issues are under DDES's administrative purview in its permit review processes and administration of the pertinent regulations, and are not under the Examiner's authority at this juncture. There was also discussion regarding the Appellants having planted numerous trees on the site, and that that "good faith" attempt to mitigate the creation of impervious surface was not being sufficiently credited by DDES in its review of the situation. Such mitigation measures and their accounting in permit review are similarly matters under DDES's administrative purview.

[8] The Examiner in any case has no authority to grant equitable relief based on improper or unfair administration of the permit process (such as by improperly "moving goalposts"). The Examiner is generally limited to applying law duly enacted by statute, ordinance and rule, or set forth in case law, and has no authority to adjudicate common law issues such as claims in equity. Equity claims would instead have to be brought in a court of general jurisdiction, the Superior Court. [*Chaussee v. Snohomish County*, 38 Wn. App. 630; 689 P.2d 1084 (1984)]

2. Submit a complete application for a building permit for the expansion of the agricultural barn structure onsite *by no later than* **June 9, 2009**. DDES notes that a pre-application meeting is required, which should be scheduled with DDES to review the Already Built Construction (ABC) issues *by no later than* **May 11, 2009**. DDES also notes that a critical area designation is required and should be applied for at least one month in advance of the complete application submittal deadline. (It should be noted that though a violation of wetland critical area regulations has not been proven in the instant case and the Notice and Order not sustained in such regard, that does not preclude DDES from acting under its administrative permit review authority to utilize whatever screening mechanisms are established for critical area review in permit processing. That administrative function is not under the Examiner's authority in the instant case.) After submittal of the complete application, all pertinent timeframes and stated deadlines for additional information, response comments, supplementary submittals, etc., if any, shall be diligently observed by the Appellants through to permit issuance and final inspection.

3. If the Appellants decide not to pursue a building permit for the agricultural barn structure additions, all pertinent non-permitted structural work shall be demolished and the demolition debris removed from the property *by no later than* **July 1, 2009**. (A demolition permit may be required; the Appellants should consult with DDES regarding any such requirement.)

4. In the event that the requested building permit is pursued and is ultimately denied, the pertinent non-permitted structural work shall be demolished and the demolition debris removed *by no later than* **60 days after such denial**.

5. DDES is authorized to grant deadline extensions for any of the above requirements if warranted, in DDES' sole judgment, by circumstances beyond the Appellants' diligent effort and control. DDES is also authorized to grant extensions of finalization of the clearing and grading work for seasonal and/or weather reasons (potential for erosion, other environmental damage considerations, etc.).

6. No fines or penalties shall be assessed by DDES against the Bowdens and/or the property if the above compliance requirements and deadlines are complied with in full (noting the possibility of deadline extension pursuant to the above allowances). However, if the above compliance requirements and deadlines are not complied with in full, DDES may impose penalties as authorized by county code retroactive to the date of this decision.

ORDERED April 9, 2009.

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Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding Code Enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE DECEMBER 3, 2008, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E07G0234

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin and Matthew Caskey representing the Department; Steve Hammond representing the Appellant and David Bowden the Appellant.

The following Exhibits were offered and entered into the record on December 3, 2008:

Exhibit No. 1	DDES staff report to the Hearing Examiner for E07G0234
Exhibit No. 2a	Copy of the Notice & Order issued June 17, 2008
Exhibit No. 2b	Copy of the Supplemental Notice & Order issued September 12, 2008
Exhibit No. 3a	Copy of the Notice and Statement of Appeal of the June 17, 2008 Notice and Order, received July 1, 2008
Exhibit No. 3b	Copy of the Notice and Statement of Appeal of the September 12, 2008 Notice and Order, received September 25, 2008
Exhibit No. 4	Copies of codes cited in the Notice & Order
Exhibit No. 5	Three aerial photographs of the subject property taken in 2000, 2002 and 2005
Exhibit No. 6	Statutory Warranty Deed, transferring ownership from Manfred and Marjorie Duske to David and Terri Bowden, recorded April 10, 2003
Exhibit No. 7a	Photographs of the subject property taken by Matt Caskey, DDES, on March 28, 2008
Exhibit No. 7b	Map depicting perspective of photographs in Exhibit 7a
Exhibit No. 8a	Copy of DDES case tracking notes for E9800255
Exhibit No. 8b	Copy of DDES case tracking notes for E03G0250
Exhibit No. 9	Copies of Construction Permit R9107786
Exhibit No. 10	Photographs of subject property taken by Appellant

The following Exhibit was entered into the record on December 4, 2008:

Exhibit No. 11	DDES emails with attached Ordinance 10870

PTD:gao
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